

Service Date: October 28, 1998

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

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IN THE MATTER of the Application of)	UTILITY DIVISION
FIRSTEL, INC. and)	
U S WEST Communications, Inc.)	DOCKET NO. D98.1.15
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	ORDER NO. 6059a
Approval of their Resale Agreement)	

**ORDER APPROVING SECOND AND THIRD AMENDMENTS
TO RESALE AGREEMENT**

INTRODUCTION

1. This Order addresses the "Second Amendment to Agreement for Service Resale (Montana)" (Second Amendment) and the "Third Amendment to Agreement for Service Resale (Montana)" (Third Amendment) filed by U S WEST Communications, Inc. (U S WEST) on October 14, 1998. The Montana Public Service Commission (Commission) approved the resale agreement between Firstel, Inc. (Firstel) and U S WEST in Order No. 6059 dated March 16, 1998. The first amendment to the parties' agreement was filed on June 15, 1998. The Commission rejected this filing because it was the same as prior amendments filed in other dockets which consistently had been rejected by the Commission. *See*, Notice of Commission Action, Docket No. D98.1.15 (July 1, 1998).

2. Order No 6059 approved the majority of the terms in the parties' agreement. It rejected four sections of the agreement and explained the reasoning in so doing. The unacceptable sections were: (1) Section IV.C.4(d), proof of authorization for placing orders on behalf of end users; (2) Section VII.C.5, the absence of notification to the Commission if termination of service to the reseller was being contemplated; (3) Section VII.Q, the absence of notification to the Commission in connection with dispute resolution; and (4) Section IV.E.7, the failure to reflect the Commission's conclusions concerning construction of new facilities. The Second Amendment revises these four sections pursuant to the Commission direction in other

dockets, and is approved as discussed below. *See, e.g., In the Matter of the Application of Sterling International Funding, Inc. and U S WEST Pursuant to Section 252(e) of the Telecommunications Act of 1996 for approval of their Resale Agreement*, Docket No. D97.12.246, Order No. 6053a (May 18, 1998) (the “Sterling docket”).

3. The Third Amendment replaces Appendix A with a revised Appendix A.

Applicable Law and Commission Decision

4. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. . 252(e)(2). The Amendments submitted for approval in this proceeding were negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. . 252(e)(2)(A).

5. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission’s approval must be approved or rejected within 90 days or it will be deemed approved. The Commission has concluded that this section applies to amendments to agreements as well. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by January 12, 1999, 90 days following the submission of the Second and Third Amendments for Commission approval.

6. The Commission must approve or reject the amendments, with written findings as to any deficiencies. 47 U.S.C. . 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. ¶ 252(a)] if it finds that

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

7. Notwithstanding the limited grounds for rejection in 47 U.S.C. . 252(e)(2)(A), the Commission’s authority is preserved in . 252 (e)(3) to establish or enforce other

requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to . 253 of the 1996 Act, which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

8. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in . . 251(b) and (c). 47 U.S.C. . . 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in . 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

9. The Second and Third Amendments to the parties' Agreement are approved as discussed below.

Ordering and Maintenance - Section IV.C.4(d), Second Amendment Section 1.1

10. Section IV.C.4(d) of the parties' agreement included a provision that Proof of Authorization (POA) for placing orders on behalf of the end user shall consist of documentation acceptable to U S WEST, which may be obtained by "A prepaid returnable postcard supplied by Reseller which has been signed and returned by the end user." The Reseller then would have to wait 14 days after mailing the postcard before placing an order to change. The Commission rejected this section because it was not consistent with § 69-3-1303, MCA.

11. The parties' First Amendment would have revised Section IV.C.4 by deleting the first paragraph and sub-paragraphs a. through d., replacing subsection IV.C.4 with the following:

Prior to placing orders on behalf of the end user, Reseller shall be responsible for obtaining and have in its possession Proof of Authorization ("POA"). POA shall consist of documentation acceptable to USWC of the end user's selection of Reseller. Such selection may be obtained in any manner consistent with Montana or federal law.

12. The Commission rejected the amended section in the Sterling docket and other dockets because it stated that U S WEST's selection of acceptable documentation could be obtained in "any manner consistent with Montana or federal law." Montana law on "slamming" is more prescriptive than the federal law and applies to unauthorized changes in local exchange service as well as unauthorized changes of a long distance carrier. The Commission stated

clearly that the provision must conform to Montana law and that the reference to federal law should be deleted. The Second Amendment deletes "or federal" from the last sentence of the section and is now acceptable.

Construction - Section IV.E.7, Second Amendment Section 1.2

7. The Commission stated that Section IV.E.7 in the parties' agreement, as first presented, could conflict with the public interest. The Commission rejected that section because it did not consider circumstances which may arise where U S WEST is required by law to construct facilities.

13. The parties redrafted Section IV.E.7 to state:

Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities unless otherwise required by Montana Law.

Section IV.E.7 is acceptable as amended.

Payment - Section VII.C.5; Second Amendment Section 1.3

14. Section VII.C in the parties' agreement detailed the provisions for payment to U S WEST by Firstel. The Commission rejected subsection 5 because it was not consistent with the public interest. We expressed our concern that Firstel's failure to pay according to its terms could subject Firstel's end-user customers to disconnection by U S WEST through no fault on their part. The Commission expressed its concern that Firstel's end user customers be notified if Firstel is going to be disconnected. The Final Order rejected subsection 5 because it included no provision for timely notifying the Commission to enable the Commission to take appropriate action to protect Firstel's end user customers.

15. In Order No. 6053a in the Sterling docket, the Commission suggested that language be included to provide that U S WEST shall notify the Commission at the same time it notifies the reseller of a pending disconnection. The Commission suggested that the first sentence of Section 1.3 in the First Amendment could be revised to state that U S WEST "will notify Reseller and the Commission of such disconnection ten (10) days prior to the effective date of the disconnection." Section 1.3 has been amended to reflect the Commission's suggestion and is acceptable.

Dispute Resolution - Section VII.Q, Second Amendment Section 1.4

16. The Commission rejected Section VII.Q of the parties' agreement, the provision for dispute resolution. Section VII.Q contained detailed provisions for resolving disputes by an arbitrator. The Commission expressed concern that the resolution determined by an arbitrator who is not the Commission may not be consistent with the Telecommunications Act of 1996 and emphasized the importance of Commission review for a decision reached by an out of state arbitrator to ensure that it complies with Montana law prior to its going into effect. The Commission rejected Section VII.Q because it did not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator.

17. The parties' first revision to Section VII.Q, Section 1.4 in the First Amendment, was nearly identical to VII.Q. However, it included changes which went beyond what the Commission identified as problematic in the agreement and included ambiguous statements about the time the decision would go into effect and the Commission review of the award. The Commission has expressed concerns that this revision did not provide for notice to the Commission prior to retaining an arbitrator, and that it permitted an arbitrator's decision to go into effect prior to Commission review and approval. In the Sterling docket, the Commission suggested that the parties revise this section to comply with the law and to provide that an arbitrated decision shall not go into effect before the Commission reviews and approves it.

18. The second revision to Section VII.Q states that the arbitrator's award "shall be final and binding and may be entered in any court having jurisdiction thereof subject to review by the Commission." It further provides that the parties shall advise the Commission that they will be settling a dispute through arbitration prior to retaining an arbitrator, that they will submit a copy of each arbitration opinion to the Commission within 10 days of service of such opinion, and that the arbitrator's decision shall become effective upon Commission approval or after the passage of 90 days of filing if the Commission takes no action concerning the filing. The revised section in the Second Amendment is acceptable.

Appendix A

19. The Third Amendment revises Appendix A. Appendix A to the Firstel agreement contains the rates charged to Firstel for resale of U S WEST's local exchange services. The Third Amendment changes the amount of the Customer Transfer Charges (CTCs), changes the discount rate from 12 percent to 18.1 percent for most services, and contains further details concerning specific services.

20. The CTCs in the original agreement were \$56.00 for business customers and \$52.00 for residence customers. The Third Amendment changes these substantially. For mediated access (OSS) changes, the CTC for residence accounts is \$12.64 for the first line and \$11.16 for each additional line; the CTC for business accounts is \$16.30 for the first line and \$13.93 for each additional line. For non-mediated access (manual), the CTC for both business and residential accounts is \$22.20 for the first line and \$16.38 for each additional line.

21. Appendix A of the original Firstel agreement provided for resale of business basic exchange lines, PBX trunks, ISDN, Frame Relay, listings and central office features at a discount of 12 percent. IntraLATA toll was available for resale at \$0.12 per minute of use. Residence lines, Centrex, private line/special access, Public Access Lines, and volume discount and/or term agreement in customer contracts or U S WEST tariffs were available for resale but with no discount from the retail rate. Lifeline, Concession Service, technical trials and grandfathered products and services were excluded from resale.

22. The Third Amendment includes one discount rate—18.1 percent—which applies to all services available for resale, except private line/special access. Grandfathered services, residence lines and Lifeline/Link-up are available to the same class of customers eligible to purchase the service from U S WEST. Services excluded from resale are customer premise equipment, enhanced services, U S WEST's calling card, inside wire and promotions less than 90 days.

23. The Firstel agreement included provisions for revising Appendix A when the Commission's decisions in other dockets became effective. This Third Amendment revises rates and other inclusions in Appendix A pursuant to the Commission's order approving the interconnection agreement in Docket No. D96.11.200.¹

24. The Commission finds that the Third Amendment to the parties' Resale Agreement should be approved.

25. By approving these Amendments, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement or its amendments and makes no findings herein on the appropriateness of many of the terms and conditions. Our

¹ See In the Matter of the Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms, and Conditions of Interconnection with U S WEST Communications, Inc., Docket No. D96.11.200, Order No. 5961f (August 6, 1998) and Order No. 5961g (September 1, 1998).

interpretation of the 1996 Act is that ¶ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and Firstel are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. Firstel is a registered reseller of U S WEST's telecommunications services in Montana. As a reseller of regulated telecommunications services in Montana, MC is subject to Commission authority to supervise, regulate and control public utilities.

3. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. ¶ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. The Commission has jurisdiction to approve the Second and Third Amendments to the resale agreement negotiated by the parties and submitted to the Commission for approval according to ¶ 252(e)(2)(A). Section 69-3-103, MCA.

7. Approval of interconnection agreements and their amendments by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. . 252. Section 252(e) limits the Commission' review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to

approve or reject the Second and Third Amendments by January 12, 1999, or they will be deemed approved.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the Second and Third Amendments to Agreement for Service Resale between U S WEST Communications, Inc. and Firstel, Inc. are APPROVED.

DONE AND DATED this 26th day of October, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.